Nos. 99-1388 and 99-1389

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION, *et al.*,
Petitioners,

v.

THE UNITED STATES, *et al.*,
Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, *et al.*,
Petitioners,

v.

THE UNITED STATES, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF OF THE HOPI TRIBE, THE NAVAJO NATION AND THE SAN JUAN SOUTHERN PAIUTE TRIBE IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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INTRODUCTION

In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Court remanded this comprehensive stream adjudication to the Arizona courts for decision with twin admonitions: (1) "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law," *id.* at 571, and (2) "[b]ecause of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by a

'historic immunity from state and local control.'" *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)). The Arizona courts have faithfully carried out this mandate. Thus, the Arizona Supreme Court determined, as a general principle of federal law, that tribal reserved water rights *may* include groundwater, depending upon the purposes for which each separate reservation was established and the availability of surface water supplies, both questions which had not yet been litigated. In so ruling, the Arizona court rejected application of the unique Arizona groundwater law which permits non-Indian pumpers without penalty to drain the aquifers under federal and tribal lands. Despite the interlocutory nature of the Arizona Supreme Court's decision, petitioners rush to seek this Court's review of a, to them, disappointing result from the state courts for whose jurisdiction they had previously argued so vigorously.

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, the Hopi Tribe, the Navajo Nation and the San Juan Southern Paiute Tribe (collectively the "Little Colorado River Tribes"), are parties, *inter alia*, to a general stream adjudication involving the watershed of the Little Colorado River. That litigation presents many of the same legal issues, including the question here presented in the petitions for a writ of certiorari, that have been raised in *In re the General Adjudication of All Rights to Use Water in the Gila River System*. *See* Appendix to Petitions for Writ of Certiorari A7 (hereinafter App.). Accordingly, the Arizona Supreme Court permitted the Little Colorado River Tribes to participate as interested parties in the proceedings below. *Id.* at A6. Indeed, the respondents have a particularized interest in the Arizona court's holding with respect to groundwater because, as pointed out more fully hereinafter, the Little Colorado Tribes' reservations are located on some of the most arid lands in the United States and, for the most part, lack a reliable supply of surface water.

A. *The Navajo Nation*: The Navajo Indian Reservation occupies an area covering approximately 25,000 square miles, or 15,432,170 acres, in Arizona, New Mexico and Utah, and was home to a population of approximately 219,200 as of 1990. DAVID H. GETCHES *ET AL.*, FEDERAL INDIAN LAW, CASES AND MATERIALS 9-13 (3d ed. 1993). As originally established by the Treaty of June 1, 1868, 15 Stat. 667, the reservation did not encompass all of the lands then occupied by the Navajo Nation. Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371, 375 (1985). The inadequacy of the 1868 Reservation was especially marked in the Little Colorado River basin in Arizona. Since 1868, the President by executive order—later ratified by Congress—expanded the reservation. *E.g.*, 25 U.S.C. § 398d; Exterior Boundaries of Navajo Reservation in Arizona, C. 521, 48 Stat. 960 (1934). Much of the Navajo Indian Reservation is wholly dependent upon groundwater for drinking water, stock raising and agriculture. Other portions are dependent upon surface water that could be depleted by off-reservation groundwater pumping.

B. *The Hopi Tribe*: Since long before Spanish explorers arrived in the Southwest, the Hopi Tribe has been dependent upon groundwater for drinking water, religious uses and gardens. The Hopi people have located their villages in order to have access to springs, which are sacred to them. Because there are no perennial streams on the Hopi Reservation, every Hopi village depends upon groundwater for drinking water, stock ponds and agriculture. The majority of irrigated acreage on the Hopi Reservation is watered from springs, or spring-fed ephemeral stretches of otherwise dry washes. Groundwater is essential to the survival of the Hopi people on the reservation set aside as their permanent homeland. *See* Treaty of Guadalupe Hidalgo, February 2, 1848, U.S.- Mex., arts. VIII, IX, 9 Stat. 922; Executive Order of December 16, 1882.

C. *The San Juan Southern Paiute Tribe*: The San Juan Southern Paiute Tribe has historically occupied lands in the Little Colorado River basin.[1] In the area occupied by the Tribe, except for one minor wash that runs briefly only in the wettest years, the only source of available water is groundwater. Through springs and wells, the Tribe uses groundwater for its domestic and agricultural needs. Given the location of its homeland, its claims are solely to groundwater. The Tribe's future survival on its arid lands can be assured only if the Tribe's right to groundwater is recognized.

STATEMENT OF THE CASE

A. *The Little Colorado River Adjudication*: The Little Colorado River basin encompasses an area of 26,964 square miles in northeast Arizona and northwest New Mexico. Indian lands occupied by five Indian tribes, including the Little Colorado River Tribes, account for approximately 11,000 square miles of the approximately 21,700 square miles in the basin in Arizona.

The Little Colorado River stream adjudication began in 1978 with the filing by the Phelps Dodge Corporation of a petition with the Arizona State Land Department to determine conflicting water rights in that basin. Today there are approximately 3,100 claimants in the Little Colorado River adjudication who have filed nearly 11,000 statements of claims. The major claimants, in addition to the Little Colorado River Tribes, include non-Indian communities (such as Show Low, Snowflake, Springerville, St. John, Holbrook, Winslow, and Flagstaff), large industrial users (such as Arizona Public Service, Phelps Dodge Corporation, Salt River Project, and Tucson Power & Electric), irrigation

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[1] Although the Tribe does not presently have a formal reservation, the court in *Masayesva v. Zah*, 794 F. Supp. 899 (D. Ariz. 1992), determined that the Tribe has a joint interest with the Navajo Nation in approximately 26,000 acres of land, and an exclusive interest in a smaller area, all northwest of Tuba City on the Navajo Indian Reservation.

companies (such as St. Johns, Silver Creek and Show Low Irrigation Companies), and the United States. The rights of all these parties are closely intertwined.

> [B]y reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1976) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951)). "This concern is heightened with respect to water rights, the relationships among which are highly interdependent." *Id.* at 819.

Although the Little Colorado River adjudication started over twenty years ago, the respective rights of the parties to water have not yet been determined, nor have most of the underlying legal and factual questions ever been litigated. This delay is due in part to an early dispute over the appropriate court to try the case,[2] in part to changes in the order the claims were to be heard,[3] and in part to stays during the course of protracted (and still on-going) settlement discus-

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[2] The Navajo Nation filed an action seeking, ultimately unsuccessfully, to have its water rights in the Little Colorado River basin adjudicated in federal court. *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982), *rev'd sub nom. Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Thereafter, the United States and the Navajo Nation sought, again unsuccessfully, to dismiss the state court adjudication. *United States v. Superior Court*, 697 P.2d 658, 671-73 (Ariz. 1985).

[3] By a pre-trial order dated April 24, 1987, the Superior Court directed that first consideration be given to water rights in three sub-basins of the Little Colorado River, which mainly involved the claims of non-Indians under state law. By order dated January 27, 1994, the court modified its approach to the litigation by directing the parties to turn their attention to the tribal claims.

sions.[4] The Little Colorado River Tribes have also participated actively at the trial court level and before the Arizona Supreme Court in briefing and oral argument during both the interlocutory consideration of certain significant legal questions and the prosecution of two Special Actions arising in related litigation, *In re the General Adjudication of All Rights to Use Water in the Gila River*. App. A7-A9.

B. *The Proceedings Below*: Like the Little Colorado River adjudication, the Gila River adjudication is still in its infancy. In December 1990, addressing an interlocutory appeal by various parties to the Gila River proceedings, the Arizona Supreme Court identified six issues that it would address on an interlocutory basis. *See* App. B. Two of those issues—whether groundwater, in the absence of available surface water, may be considered to satisfy federal reserved rights under the doctrine first announced in *Winters v. United States*, 207 U.S. 564 (1908), and whether federal rights to groundwater are entitled to protections which differ from those provided under state law—were the subject of the Arizona Supreme Court's decision below. The Arizona court answered both questions in the affirmative, although petitioners seek review here only of the decision on the first question.

In addressing the applicability of the reserved rights doctrine to groundwater, the Arizona court first noted that the task in water rights adjudication is to examine the conflicting claims to water under state and federal law, stating "[a]n adjudication such as this cannot achieve its comprehensive purpose without quantifying and prioritizing federal, as well as state law, claims." App. A13; *accord Arizona v. San*

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[4] As petitioners have pointed out, "there have been four settlements approved by the Gila Adjudication court that resolve some or all of the claims of specific Indian tribes within the basin." Phelps Dodge Pet. at 5 n.2. *See also* Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat.1261, 1274 (Papago Tribe).

Carlos Apache Tribe, 463 U.S. 545, 552, 570 (1983). Quoting this Court's decision in *San Carlos Apache Tribe*, the court noted that it must apply "federal substantive law to measure federal rights in [this] state adjudication." App. A15. In defining the scope of the reserved rights doctrine, the court also quoted from *Cappaert v. United States*, 426 U.S. 128, 138 (1976), to establish, among other principles, that water is reserved "to the extent needed to accomplish the purpose of the reservation." App. A15.

Turning to the question of whether groundwater at least theoretically could be reserved, the Arizona Supreme Court carefully considered whether, under existing precedent, groundwater could be counted among the resources available to satisfy federal reserved rights to water. Relying on *Winters*, 207 U.S. at 569, and *Arizona v. California*, 373 U.S. 546, 599 (1963), the Arizona court held:

> The reservations in those cases depended for their water upon perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life.

App. A19.

The Arizona court bolstered its holding that groundwater may be included to satisfy federal reserved water rights by looking to this Court's holding in *Cappaert*. There, the Court recognized surface water and groundwater as "integral parts of the hydrologic cycle." App. A19 (quoting *Cappaert*, 426 U.S. at 142). Because of such integration, there is no difference between "surface and groundwater when identifying the water to be protected." App. A20. According to the court, "[t]he significant question for the purpose of the

reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.*

Finally, the court stated that it was deciding the issue "in the abstract" and that it was not holding "that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." App. A24. The court further explained that "[t]o determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *Id.* (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)). Finally, the court admonished that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." App. A24.

The present petitions followed.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ARIZONA SUPREME COURT IS NOT A FINAL JUDGMENT OR DECREE AND THUS IS NOT SUBJECT TO REVIEW UNDER 28 U.S.C. § 1257(a).

A. Petitioners admit the ruling below is interlocutory.

The Arizona Supreme Court has concluded, as a matter of federal law, that the reserved water rights of Indian tribes, recognized and protected by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963), may include underground water as well as surface water depending upon the facts and circumstances surrounding the establishment of each reservation. The court below heard this issue on appeal pursuant to a 1989 Special Procedural Order Providing for Interlocutory Appeals and Certification and at an early stage of proceedings before the

trial court. *See* App. C. Among other outstanding questions, the trial court has yet to determine, as it eventually must, the nature and extent of the reserved water rights for each Indian reservation and, also on a case-by-case basis, whether groundwater actually was intended and is needed to satisfy those particular rights.

Under 28 U.S.C. § 1257(a), the Court may review only "[f]inal judgments or decrees rendered by the highest court of a State." The Arizona Supreme Court's ruling in this case plainly was "interlocutory," and is so conceded by the petitioners in No. 99-1388.[5] Phelps Dodge Pet. at 9. The Court, therefore, does not have jurisdiction to entertain the petitions unless the otherwise interlocutory holding of the court below somehow fits within the limited category of cases where section 1257(a) finality has been found even though further proceedings in the lower courts are contemplated. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-79 (1988). *But see Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (review in the absence of a final judgment without any adverse effect upon important federal interests would permit the "exception to swallow the rule"). The finality rule with respect to review of state court proceedings is, of course, based upon sound principles of federalism. *See, e.g., North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159 (1973) (the finality rule "limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs"); ROBERT L. STERN, *ET AL.*, *SUPREME COURT PRACTICE* 95 (7th Ed. 1993). As is next demonstrated, the decision of the Arizona Supreme Court abjectly fails the finality test.

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[5] The Salt River Project petitioners in No. 99-1389 do not discuss the jurisdiction of the Court.

B. The exceptions to the final judgment rule set forth in *Cox Broadcasting* are not applicable where significant federal questions remain unanswered.

In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), the Court set forth four categories of cases involving 28 U.S.C. § 1257(a) or its predecessors where, in a departure from the "requirement of finality," this Court has reviewed interlocutory decisions "without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The Court further pointed out, however, that "[i]n most, if not all, of the cases in these categories, these additional [state court] *proceedings would not require the decision of other federal questions* that might also require review by the Court at a later date." *Id.* (emphasis added) (footnote omitted); *accord Flynt v. Ohio*, 451 U.S. at 621. The comprehensive water rights adjudication proceedings from which the decision below arises still involve fundamental and decisive unresolved questions of federal law, such as the interpretation of federal treaties, statutes and executive orders to determine what water rights were intended to be reserved when various Indian reservations were established. These significant unresolved federal questions, standing alone, should preclude piecemeal review of an Arizona Supreme Court decision which deals with only part of the case. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945) ("Of course, where the remaining litigation may raise other Federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews."); *North Dakota Pharmacy Bd.*, 414 U.S. at 159 (the finality rule "avoids piecemeal review by federal courts of state court decisions").

In any event, the decision below does not fit within any of the four exceptions to the final judgment rule described in

Cox Broadcasting. The first category, for example, covers cases where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Here in the proceedings below, virtually all the basic legal and factual issues have not yet been reached, much less conclusively decided.[6] In addition to the matters of treaty and statutory interpretation mentioned above, the Arizona Supreme Court has listed for future briefing and argument the following critical question of federal law independent of the groundwater issue: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" App. A8; App. B2. In short, the ultimate result below hardly can be classed as preordained or free of other federal issues. *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120 (1981).

The second *Cox Broadcasting* category includes cases in which the federal issue "will survive and require decision regardless of the outcome of further state court proceedings." 420 U.S. at 480 (citing *Radio Station WOW* and *Brady v. Maryland*, 373 U.S. 83 (1963)). The cases cited by the Court in *Cox Broadcasting* as falling into this category all are distinguishable since, unlike this case, none involved outstanding federal issues in addition to the question actually decided by the highest court of the State.[7] Moreover, whether

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[6] In a filing before the Superior Court in the Little Colorado River adjudication (attached as Exhibit A), the State of Arizona, in requesting a pretrial conference, declared as recently as April 17, 2000: "The State of Arizona agrees [with Phelps Dodge and others] that the litigation of tribal claims and objections to tribal claims will require this Court to address complex legal and factual issues." Exhibit A at 1.

[7] In addition to *Radio Station WOW* and *Brady*, the Court in *Cox Broadcasting* relied upon *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U.S. 362 (1914), and *Forgay v. Conrad*, 6 (How.) U.S. 201 (1848). As is pointed out in *Radio Station WOW*, "the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable

the issue decided by the Arizona Supreme Court will survive and need to be decided by this Court is directly related to the outcome of further state court proceedings—a result which is currently unknown and unknowable. That outcome will depend upon: (1) whether the state courts construe the treaties, statutes or executive orders establishing a particular Indian reservation as having reserved groundwater; and (2) if so, whether any particular third party, including petitioners, is hurt by recognition of such reserved water rights. After all, as petitioners so frequently point out, Phelps Dodge Pet. at 24; Salt River Pet. at 5-6, 22, an earlier user of groundwater has no cause of action or other claim under Arizona law against a subsequent user, including an Indian tribe, who makes "reasonable and beneficial" use of the water underneath his or her own lands.[8] ARIZ. REV. STAT. § 45-453. In other words, the one federal issue among many decided, or to be decided, by the Arizona Supreme Court, on which petitioners seek review, may not survive further lower court proceedings and thus may never need to be decided by this Court.

The third *Cox Broadcasting* exception covers cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had,

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and is to be deemed dissociated from a provision for an accounting," 326 U.S. at 126, circumstances that do not exist in the instant case.

[8] Petitioners potentially could be adversely affected if their use of groundwater were curtailed to protect reserved water rights—a principle of federal law which the Arizona Supreme Court also recognized. App. A25-A28 (Question 5). Petitioners, however, have declined to seek review of that portion of the Arizona court's holding, Phelps Dodge Pet. at 9 n.4; Salt River Pet. at 9 n.7, perhaps in view of this Court's ruling in *Cappaert v. United States*, 426 U.S. 128 (1976) (pumping of underground water may be enjoined to protect prior federal reserved rights to surface water).

whatever the ultimate outcome of the case." 420 U.S. at 481. In the cases cited by the Court as examples of this category,[9] review after further lower court proceedings would have been precluded because, if the petitioner won below, the federal issue might become moot or the matter be decided on state law grounds, and if the petitioner again lost, any appeal would be barred for reasons of state law. *Id.* That is not this case. We are not aware of any state law, rule or other circumstance, and petitioners cite none, which would prevent them, if adversely affected, from preserving the federal issue decided by the Arizona Supreme Court for review by this Court after a final decree is entered. As the Court pointed out in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976),

> questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are *federal questions* which, if preserved, can be reviewed [by the Supreme Court] *after final judgment* by the Colorado court.

Id. at 813 (quoting *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971)) (emphasis added).

The fourth category of interlocutory decisions treated as final, according to *Cox Broadcasting*, and the sole exception upon which petitioners rely, Phelps Dodge Pet. at 10-11, consists of cases (1) where "the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issues by the Court" and (2) "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83. This case does not meet either of these conditions. Since the critical issues

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[9] *California v. Stewart*, 384 U.S. 436 (1966); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).

here *sub judice*—the nature of federal reserved water rights and the intent expressed in the government documents reserving such water rights—are all exclusively federal questions, petitioners cannot possibly prevail on non-federal grounds. Similarly, since the underlying cause of action involves, *inter alia*, the extent of federal reserved water rights, of which groundwater is only a part, a decision by this Court on the question presented for review cannot possibly preclude further litigation.

In order to justify exercise of this Court's jurisdiction, petitioners rip from context the Court's words in *Cox Broadcasting* that review may be granted "if a refusal immediately to review the state court decision might seriously erode federal policy." Phelps Dodge Pet. at 10 (citing 420 U.S. at 483). Petitioners carefully omit the Court's preceding statement—that the alleged erosion of federal policy comes into consideration *only* if the above-described two conditions are met, *i.e.*, only "[i]n these circumstances" may review be granted. 420 U.S. at 483. As demonstrated above, particularly given the continued existence of unresolved federal questions, the predicate "circumstances" do not exist in this case, so the matter of federal policy should never be reached.

Even assuming, *arguendo*, that federal policy implications might be relevant to an analysis of finality, petitioners still fail to show any federal policy that is placed in jeopardy by the decision below. Indeed, what really troubles petitioners is that the Arizona courts have upheld federal policy. Specifically, the Arizona Supreme Court's holding, rather than eroding federal policy, in fact protects from erosion the federal reserved water rights doctrine set forth by this Court in *Winters* and *Cappaert*.[10] In addition, petitioners' argu-

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[10] As the Court observed in *Flynt v. Ohio*:

> The cases which the Cox opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional

ment that "state law . . . should be adopted as the rule of decision for determining rights under federal law," Phelps Dodge Pet. at 11, repeatedly has been rejected by this Court in federal reserved water rights cases. *See Winters*, 207 U.S. at 577-78; *Cappaert*, 426 U.S. at 145-46; *Arizona v. California*, 373 U.S. at 597-602; *see also United States v. New Mexico*, 438 U.S. 696, 715 (1978) ("the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas"); *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571 (state courts must apply federal substantive law to measure federal rights in state water rights adjudication). Stated quite simply, the applicable federal policies are not what petitioners say they are, and none is eroded by the decision below.

The fact that the Court has reviewed decisions of state supreme courts in federal reserved water rights litigation under other circumstances is irrelevant. Of the two cases cited by petitioners, Phelps Dodge Pet. at 13, the Court in *United States v. New Mexico*, had under review a final judgment defining the water rights of a specific federal reservation, 438 U.S. at 698, and in *Wyoming v. United States*, 492 U.S. 406 (1989), a case where no opinion was rendered, the Court had under consideration a decision where all the federal issues, including quantification of the Tribes' water rights, had been tried and determined. *See In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 85 (Wyo. 1988). These cases and, presumably, any similar water rights decisions thus involved final judgments or decrees or fell within one of the *Cox Broadcasting* exceptions. The decision below does not.

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policies which would have been undermined by the continuation of the litigation in the state courts.

451 U.S. at 622.

II THE DECISION OF THE ARIZONA SUPREME COURT IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND THUS REQUIRES NO REVIEW.

A. The court below correctly determined that the nature and extent of reserved water rights, including rights to groundwater, depend upon the purposes for which each federal reservation was created.

This Court repeatedly has ruled that the scope of federal reserved water rights depends upon the intent of the parties when each specific reservation was established. *Winters v. United States*, 207 U.S. at 575 ("The case, as we view it, turns on the agreement of May, 1888 [25 Stat. 113], resulting in the creation of the Fort Belknap Reservation."); *Arizona v. California*, 373 U.S. at 597 ("under our view, the Indian claims here [to water] are governed by the statutes and Executive Orders creating the reservations"); *Cappaert v. United States*, 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."). In short, the nature and extent of federal reserved water rights cannot be ascertained without first knowing the purpose for which the reservation was created.

The decision of the Arizona Supreme Court in this case is wholly consistent with the above-cited holdings of the Court. Thus, the court below concluded that, in federal reserved water rights cases, the trial court must determine the purpose of the reservation and then determine the waters necessary to accomplish that purpose—both "fact-intensive inquiries that must be made on a reservation-by-reservation basis." App. A24 (citing *United States v. New Mexico*, 438 U.S. at 700). Given the complete absence of trial court findings or any factual record on the subject, Phelps Dodge Pet. at 14, the

Arizona Supreme Court refused to decide that any particular reservation has a reserved right to groundwater. Rather the court held only that a reservation *might have* such a right if the facts and circumstances under which it was created ultimately so indicate. App. A24. On this point the court below further declared that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation," *id.*, *i.e.*, the Government may have intended to reserve groundwater because the purpose of the reservation would otherwise be frustrated There is nothing new in that analytic approach to application of the reserved water rights doctrine.

Petitioners assert as a basis for review, however, the proposition that the Arizona Supreme Court's decision that reserved waters may include groundwater is improper because it was rendered "in the abstract" and "without aid of a record establishing the purposes of any federal reservation." Phelps Dodge Pet. at 14. This argument is self-defeating. Petitioners, in seeking review at an interlocutory stage of the proceedings, are asking this Court to take exactly the same action for which they fault the Arizona court—in short, to rule that groundwater may *not* be included within a reserved water right, also without aid of a factual record establishing the purposes of any federal reservation or the water supplies available to the reservation. Petitioners would have the Court establish a *per se* rule negating federal rights to groundwater, regardless of the underlying facts.

On the contrary, as petitioners acknowledge, this Court has determined reserved water rights "only after careful review of the underlying legal instruments by which the reservation in question was created." Phelps Dodge Pet. at 14-15. That is exactly the inquiry the court below directed. App. A24. Petitioners' argument thus shows plainly that their request for review at this time not only is premature, but also conflicts

with the orderly determination of reserved water rights previously sanctioned by the Court.

B. The Arizona Supreme Court correctly decided that federal reserved water rights in Arizona as elsewhere must be determined in accordance with federal and not state law.

In *Winters v. United States*, the Court recognized and protected a reserved water right under federal law that was independent of and paramount to any water right acquired under state law after the federal reservation had been established. The Court repeatedly has ruled since that 1908 decision that the nature and extent of federal reserved water rights are governed by federal and not state law. *See, e.g., Cappaert v. United States*, 426 U.S. at 145 (the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation"); *United States v. New Mexico*, 438 U.S. at 715 ("the 'reserved water rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas."). Indeed, in the direct judicial antecedent to the instant proceedings, the Court declared that in state water adjudications, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571.

The Arizona Supreme Court in this case has simply followed that unbroken line of decisions. App. A15. Petitioners seek to distinguish these past holdings, however, by claiming that the Court there refused to apply state laws regulating the appropriation of water, but the Arizona law regulating groundwater is different. Phelps Dodge Pet. at 16-17, 24-25; Salt River Pet. at 20. Instead of first in time, first in right, as under the appropriation laws, the Arizona groundwater statute is said to permit all landowners to use groundwater underlying their lands for any reasonable purpose regardless of priority in time of use. Phelps Dodge Pet. at 24. Since federal

agencies and Indian tribes can pump groundwater pursuant to state law, petitioners allege, the court below should have invoked state law to define the federal right.

In addition to conflicting with 92 years of contrary precedents in this Court expressly holding that federal and not state law governs reserved water rights,[11] petitioners' argument that state law would protect reserved rights is demonstrably untenable in its own context. Specifically, as the Arizona Supreme Court recognized, "[a] theoretically equal right to pump groundwater, in contrast to a *reserved* right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers," App. A23, emphasis in original, a situation that already has occurred in the Lower Gila River watershed. *Id.* at A23-24. Moreover, if state law governs federally protected uses of groundwater, the State of Arizona—which is not known for being friendly to federal and Indian tribal water rights[12]—could amend state groundwater law to include federal and Indian reservations within "active management areas" or "irrigation non-expansion areas," and thus prohibit new uses of groundwater regardless of the purposes for which such reservations were created and their actual water needs. *See* Phelps Dodge Pet. at 25; Salt River Pet. at 5, n.3; State of Arizona Response at 6-8; *cf. Cappaert v. United States*, 426 U.S. at 136-138 (off-

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[11] State laws in general do not apply to Indian lands or property. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *Rice v. Olson*, 324 U.S. 786, 789 (1945)("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

[12] In 1995, Arizona enacted legislation to enlarge water rights acquired under state law at the expense of federal and Indian water rights, substantial portions of which the Arizona Supreme Court declared unconstitutional. *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999).

reservation pumping curtailed to protect a reserved surface water right). In short, Arizona groundwater law protects most existing uses—almost all now by non-Indians—but allows for prohibiting or sharply limiting new uses. State of Arizona Response at 5-8. Application of such a regulatory regime clearly would frustrate the purposes for which currently underdeveloped Indian reservations were established in circumstances where surface water supplies are inadequate. Petitioners' rationale (*i.e.*, even-handedness) for asking the Court to give primacy to Arizona's groundwater statutes, therefore, cannot survive even the most cursory scrutiny.

As previously noted, *supra* at section II.A., whether recognition of federal reserved water rights will affect current groundwater users, and also whether that effect will differ from the impact upon owners of appropriated water rights under state law, simply cannot be determined by this Court or any other court at this early date in the litigation in the absence of a record. Such determinations remain to be made—at least initially in the trial court. Petitioners' argument that the court below erred by failing to "integrate the disparate federal and state-law rights," Phelps Dodge Pet. at 17, with respect to groundwater thus is clearly incorrect. Petitioners never explain (nor could they) how the lower courts could "integrate" state law rights and federal reserved water rights when the latter rights have not yet been identified. Petitioners' additional arguments about statewide water shortages and that "[g]roundwater is and will remain an important component of Arizona's mix of water resources," Salt River Pet. at 16, do demonstrate, on the other hand, the desirability if not the necessity of considering groundwater as part of any comprehensive adjudication of water rights in the arid Southwest. As the State of Arizona points out, "groundwater 'is the primary water supply in most areas of the State,' " State Response in Support of Petitions at 3, a condition surely true also for Indian reservations.

C. The cases cited by petitioners as supporting application of state law are inapposite.

Petitioners rely upon two cases, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), in support of their argument that the Arizona Supreme Court erred in failing to adopt state law as the measure of the applicable federal law. Phelps Dodge Pet. at 17-22; Salt River Pet. at 23. Neither case supports adopting state law to govern reserved water rights.

Kimbell Foods sets forth in a commercial context certain general principles as to when federal law questions should be decided on the basis of state law rules. 440 U.S. at 728-29. This Court, however, long ago decided that federal reserved water rights questions are an exception and are to be decided without regard to state law. *United States v. New Mexico*, 438 U.S. at 715; *see also Winters v. United States*, 207 U.S. at 577-78. Moreover, this case does not meet the *Kimbell Foods* test for applying state law on two counts: (1) federal reserved water rights "by their nature are and must be uniform in character throughout the Nation;" and (2) "application of state law would frustrate specific objectives of the federal" reservations. *Id.* at 728. Indeed, were the *Winters* doctrine otherwise, states would be free to enact ostensibly non-discriminatory legislation which actually is aimed at defeating federal and Indian tribal water rights, as Arizona already has attempted during the course of these proceedings. App. A9 (citing *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999) (holding retroactive changes in state water law unconstitutional in substantial part)); *see supra* at 19.

Wilson v. Omaha Indian Tribe is also not a reserved water rights case. There, in a title dispute involving an Indian reservation, the Court had under consideration whether state law relating to accretion/avulsion should be adopted as the

governing federal law. The land in question had moved from the west to the east side of the river and thus from Nebraska to Iowa, but the major federal concern over the boundary between these states already had been resolved by interstate compact. Under these unique circumstances, the Court found no need for a nationwide rule or that application of state law would adversely affect any major federal interest, particularly since "[o]n some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is likely on other occasions that the tribe will stand to gain." 442 U.S. at 673. This case, on the other hand, is not so devoid of an adverse impact upon significant federal rights.[13] Plainly this Court cannot conclude in the absence of any record that application of state groundwater law principles would have a neutral, rather than unfavorable effect, on federal reserved rights on Indian reservations in Arizona.

III. THE DECISION BELOW HAS NO NATIONAL SIGNIFICANCE AND NO IMMEDIATE IMPACT EVEN IN ARIZONA.

A. Arizona's exclusion of groundwater from the law of prior appropriation is not generally the rule in other states.

Petitioners focus on Arizona's legal bifurcation of surface and groundwater under which reasonable use, rather than the doctrine of prior appropriation, governs the taking of groundwater. Phelps Dodge Pet. at 24-26; Salt River Pet. at 23-28. Under the current Arizona system, landowners may pump "percolating" groundwater on their lands limited only by the doctrine of reasonable use. In contrast to the prior

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[13] After *Wilson*, the Court rejected borrowing a state statute of limitations as federal law where that would foreclose a tribal claim to land because such action "would be inconsistent with federal policy." *Oneida County v. Oneida Indian Nation*, 470 U.S. at 241.

appropriation doctrine, no priority attaches to such uses under Arizona law and, unless the pumpers are located in an "active management" or "irrigation non-expansion" area subject to certain statutory restraints against new uses, they are free to pump water beneath their land regardless of the impact that pumping may have upon either surface or groundwater supplies used by other persons. Phelps Dodge Pet. at 24-25; Salt River Pet. at 5-6. Petitioners contend that because Arizona law does not generally inhibit the use of groundwater by a landowner, state law is sufficient to allow an Indian tribe in Arizona to use groundwater when that resource is needed to fulfill the purposes of its reservation. Phelps Dodge Pet. at 25; Salt River Pet. at 24. Petitioners, of course, do not discuss what the impact on reserved water rights might be if Arizona were to adopt a "non-discriminatory" amendment to its Groundwater Code to prohibit or drastically limit all new pumping of groundwater, which is what most Indian uses will be.

Petitioners' arguments for review of the Arizona Supreme Court's decision turn in large part on the hydrologically-erroneous provisions of Arizona law which declare that percolating groundwater is distinct from surface water. *See In re the General Adjudication of All Rights to Use Water in the Gila River System*, 857 P.2d 1236, 1243 (Ariz. 1993); App. A11 (describing the assumptions of Arizona groundwater law as an "artifice"). These arguments ignore the fact that, unlike Arizona, virtually all other western states do *not* exclude groundwater from the application of the prior appropriation doctrine because they do not make the same artificial distinction between surface and groundwater. Indeed, of the ten western states listed by petitioners as having substantial federal and tribal lands, only California refuses to apply the doctrine of prior appropriation to groundwater. Salt River Pet. at 13 n.10; *compare* State Response in Support of Petitions at 17 n.20. As a result, the supposed ready access to groundwater under Arizona law that

the petitioners tout as sufficient to meet the needs of the Tribes is simply not a part of the law in other western states. Given Arizona's unique groundwater rules, this case has no national significance.

The difficulties petitioners claim may confront the adjudication court in integrating the right to use groundwater under federal law with the uncurtailed pumping of groundwater allowed under Arizona law are equally insubstantial. No doubt, as the state court recognized, that task will require thoughtful consideration by the parties and the courts. App. A28-29. But such problems are hardly insurmountable. Whatever doctrine or doctrines apply to the use of groundwater, the integration of state and federal rights inevitably will closely parallel the similar efforts that must be undertaken with regard to surface water—a task which this Court has found the state courts fully competent to handle. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. at 570. In any event, the rights can only be "integrated" after they have been determined, a task that remains to be done.

To summarize, petitioners' challenge to the decision below rests in significant part on the unique provisions of Arizona groundwater law which allow uninhibited pumping of the resource outside of statutorily restricted areas, but which stand apart from the law of virtually all other western states. Thus, neither the so-called advantage of Arizona law that enables Indian tribes to pump water on their reservations regardless of the extent of pre-existing demand on the underlying aquifer nor any difficulties that may arise in melding federal rights with otherwise unregulated pumping are present in those other states. Accordingly, the interlocutory decision of the Arizona Supreme Court is a poor vehicle for this Court to determine whether the purposes of the Indian reservations in question require the use of groundwater as well as surface water.

B. A ruling by this Court will not eliminate groundwater users from the litigation.

In an effort to inflate the importance of the question presented, petitioners argue that, absent this Court's overruling the Arizona Supreme Court, "thousands of claimants in the Gila River Adjudication will be forced to endure long and complex litigation." Phelps Dodge Pet. at 12 (internal quotation omitted). This plea is misguided. Assuming, *arguendo*, that the decision below were reversed, the same thousands of claimants, presumably groundwater users, still would have to remain in the litigation because their pumping might have to be curtailed to protect the federal reserved surface water rights that are decreed. *Cappaert v. United States*, 426 U.S. 128 (1976), plainly holds that surface water rights reserved under federal law are entitled to protection against groundwater pumpers exercising after-acquired rights pursuant to state law. Unfortunately, the very concept of a comprehensive stream adjudication, virtually by definition, inexorably requires hundreds or thousands of parties to participate, and this litigation will be long and complex with or without consideration of groundwater to satisfy federal reserved rights.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE WYOMING SUPREME COURT'S DECISION IN *BIG HORN*.

Petitioners assert that the Arizona Supreme Court's decision in this case conflicts with the decision of the Wyoming Supreme Court in *In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989). Petitioners' claim of conflict with *Big Horn* is mistaken and provides no basis for review by this Court.

In *Big Horn*, the Wyoming court analyzed the Shoshone and Arapaho Tribes' water rights claims in light of the purposes for which the Wind River Reservation had been established. The reservation in fact had been selected because it lay in the Big Horn River valley with fertile land and an abundant surface water supply. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). The court determined that the sole purpose of the reservation was for agriculture, and that its purposes did not include mineral and industrial development. 753 P.2d. at 98. The Tribes' claims for municipal, domestic and commercial uses, for which they had sought a separate water right, were further determined to be subsumed within the Tribes' agricultural water right. *Id.* at 99. In substance, the court determined that the purposes of the Wind River Reservation were satisfied entirely by the Tribes' surface water right for agriculture, an amount in excess of 500,000 acre-feet.[14]

Only after its finding that the reservation's water rights were limited to agricultural uses did the Wyoming Supreme Court address the application of the reserved water rights doctrine to groundwater. The court recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 99 (citing *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (D. Mont. 1968)("whether the [necessary] waters were found on the surface of the land or under it should make no difference")). Nonetheless, the Wyoming court concluded, without analysis or explanation,[15]

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[14] The Arizona courts in this case, of course, have not made any comparable study of the purposes or water needs of any Indian reservations.

[15] The *Big Horn* court did note that "not a single case applying the reserved water doctrine to groundwater is cited to us." 753 P.2d at 99, but then cites *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974),

that "the reserved water doctrine does not extend to groundwater." *Id.* at 100. Given the facts of the case, where the agricultural purposes of the Wind River Reservation could be wholly satisfied by available surface water, this conclusion was *dicta*.

The Arizona Supreme Court, on the other hand, was "fairly confronted with the issue." App. A17. After careful analysis of the relevant judicial precedents and Arizona statutory law, the court affirmed the trial court's determination that "the federal reserved water right doctrine applies not only to surface water but to groundwater." *Id.* at A24. The Arizona court pointed out, however, that a final determination of reserved rights to water requires "fact-intensive inquiries that must be made on a reservation-by-reservation basis" and that groundwater, if an intent to reserve it is found, still will be limited to the amount necessary if "other waters are inadequate to accomplish the purpose of a reservation." The "fact-intensive inquiries" mandated by the Arizona court, of course, are the same as and thus consistent with the reservation purposes analysis made by the Wyoming court. Accordingly, there is no conflict between the basic approaches to reserved water rights utilized by the two state courts, and no basis for review by this Court at this time.

Finally, petitioners' claim of "uncertainty" caused by the Arizona court's decision is also mistaken. *See* Phelps Dodge Pet. at 28-29; Salt River Pet. at 11-13 (citing *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (Rodeghiero, J., dissenting)). The existence of reserved water rights claims to groundwater creates no greater uncertainty than reserved rights claims to surface water. The petitioners' claim of uncertainty is nothing more than a retread of the age-old argument raised against the existence of

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which did so hold prior to this Court's decision on review reserving judgment on the question. *Cappaert v. United States*, 426 U.S. at 143.

reserved water rights *in toto*. Such arguments have been made to no avail at least since this Court first announced the Indian reserved rights doctrine in *Winters v. United States*. Indeed, the non-Indians in *Winters* argued that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, and said communities will be broken up, and the purpose and object of the government in opening said lands for settlement will be wholly defeated." 207 U.S. at 570. The argument was not accepted there nor in any subsequent cases. *See, e.g., Arizona v. California*, 373 U.S. at 599 ("Much the same argument made to us was made in Winters to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable."). Likewise, petitioners' claim of uncertainty here presents no basis for this Court's review of the decision below.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Briefs in Opposition of other respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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